Petition

81-592

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED W. MUELLER and AL MUELLER REALTY COMPANY,
Petitioners,

v.

JOHN J. RUDDY, RALPH H. SLAVENS and L. K. WOOD, Comprising THE MISSOURI REAL ESTATE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

This case originated by The Missouri Real Estate Commission bringing charges against ALFRED MUELLER and AL MUELLER REALTY COMPANY[1] for alleged misconduct. James McKee was the investigator who handled this case as an employee of the State of Missouri for the Missouri Real Estate Commission.

The question arising in this case is: Was petitioner's right to due process violated where the investigator for the Missouri Real Estate Commission solicited a bribe from petitioner for information showing that petitioner was being railroaded where the investigator represented to the petitioner that he had information which could "turn the case one way or another" and where the investigator thereafter refused to testify in depositions or at trial regarding these matters, invoking his Fifth Amendment privilege against self incrimination, resulting in petitioner's inability to obtain exonerating or mitigating evidence; and where, as a result thereof, petitioners' licenses to engage in the real estate business and thereby earn a livelihood have been taken away.

PARTIES

All parties to this matter are fully set out in the caption.

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[1] Al Mueller Realty Company is not a holding company, a subsidiary, or an associated company. No other companies have financial interests in it and it has no financial interest in any other companies.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	i
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	9
Appendix:	
Appendix A. Findings of fact, conclusions of law and decision of administrative hearing commissioner in Missouri Real Estate Commission, petitioner v. Alfred W. Mueller, Al Mueller Realty and David E. Windmueller, Case Number 78005 and 78005-A.	A-1
Appendix B. Order of Missouri Real Estate Commission of April 19, 1979 revoking petitioners licenses.	A-13
Appendix C. Order of the Honorable Ninian Edwards, Circuit Judge, confirming order of Missouri Real Estate Commission and denying petition for review.	A-15

Appendix D. Opinion of The Missouri Court of Appeals, Eastern District affirming the judgment of the Circuit Court..... A-16

Appendix E. Order of Missouri Court of Appeals denying application for rehearing or transfer. A-36

Appendix F. Order of The Missouri Supreme Court denying application for transfer. A-38

Related Documents In Collateral Procedure

Appendix G. Petition for writ of prohibition directed to Missouri Court of Appeals, Number 40484. A-40

Appendix H. Order of The Missouri Court of Appeals, Eastern District denying petiton for writ of prohibition. A-44

TABLE OF AUTHORITIES

United States Constitution Amendments V and IV 2,6

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1962) 4,7,8

Slochower v. Board of Higher Education of the City of New York, New York, 76 Sup.Ct., 350 U.S. 551, L.Ed. 692 (1956) 6

Goldberg v. Kelly, 397 U.S. 254, 90 Sup.Ct. 1011, 25 L. Ed.2d. 287 (1970) 6

McCormick Evidence, § 355 (1972) 4

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

The petitioners, ALFRED W. MUELLER and AL MUELLER REALTY COMPANY, pray that a writ of certiorari issue to review the opinion and judgment of the Missouri Court of Appeals, Eastern District where the opinion was issued on April 14, 1981. That Court denied an application for rehearing and transfer on May 15, 1981. The Missouri Supreme Court denied a timely motion for transfer on July 14, 1981.

OPINIONS BELOW

The findings of fact and conclusions of law of the administrative hearing officer are not reported but appear in the Appendix. The judgment of the St. Louis County Circuit Court does not contain an opinion but said judgment appears in the Appendix. The appeal to the Missouri Court of Appeals, Eastern District is published at 617 S.W.2d 466. That citation also contains within it the denial by the Court of Appeals of the motion for rehearing and/or transfer, and also the notation of the Missouri Supreme Court's denial of the application to transfer.

JURISDICTION

This petition for writ of certiorari follows a decision of the Missouri Court of Appeals, Eastern District on April 14, 1981 affirming an order of The Missouri Real Estate Commission revoking licenses of petitioners, a real estate broker and a real estate business. The Missouri Court of Appeals denied motions for rehearing and transfer by its order of May 15, 1981. Thereafter, the Missouri Supreme Court on July 14, 1981 denied petitioners' timely application for transfer of the case to the Missouri Supreme Court. That ruling is not appealable and constitutes final determination by the highest Court in the State of Missouri. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3) and pursuant to the provisions of Sup.Ct. Rule 17 (.1)(c).

CONSTITUTIONAL PROVISIONS INVOKED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment XIV:

> ". . . (N)or shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Petitioner ALFRED MUELLER was a real estate salesman and broker licensed by the Missouri Real Estate Commission. AL MUELLER REALTY COMPANY is a Missouri corporation owned by petitioner ALFRED W. MUELLER.

The Missouri Real Estate Commission filed charges against ALFRED MUELLER charging misrepresentation and multiple representation. The investigator for the Missouri Real Estate Commission was James McKee. During his first deposition, McKee refused to answer questions upon instruction by Mr. Bushman, the attorney for the Real Estate Commission on the basis of work product and because the Commission's file had been turned over to the attorney for MR. MUELLER. McKee then gave a second deposition in which he invoked the Fifth Amendment privilege against self incrimination to numerous questions concerning exonerating evidence and evidence that would show that the charges against MUELLER were unfair.

Prior to the administrative hearing, petitioner moved to dismiss and to strike the Commission's pleadings or to stay proceedings because of McKee's failure to disclose this evidence. These motions were denied. At the hearing itself, McKee was called by petitioner's attorney as an adverse witness. McKee refused to answer any questions propounded to him regarding the investigation of AL MUELLER on the basis of his Fifth Amendment privilege against self incrimination. The attorney for The Real Estate Commission then asked McKee if he had given a deposition on May 17, 1978 (the second deposition). The deposition was then offered into evidence by The Real Estate Commission. After initially objecting to the introduction, the attorney for petitioner MUELLER withdrew the objection on

the basis that the Commission was adopting McKee as their witness. McKee then refused to answer any questions relating to the subject matter of the deposition based on his Fifth Amendment privilege when petitioner's attorney attempted to cross-examine him.

As soon as McKee refused to testify based on the Fifth Amendment privilege, petitioner filed a writ of prohibition in the St. Louis City Circuit Court seeking to stay the administrative hearing because of investigator McKee's invocation of the Fifth Amendment regarding exonerating evidence. This writ was denied. Petitioner then filed a writ asserting the same Constitutional arguments in the Missouri Court of Appeals Eastern District, which was also denied. The hearing then proceeded and the hearing commissioner found petitioner guilty of violating Chapter 339 R.S.Mo. The Missouri Real Estate Commission then revoked petitioner's real estate licenses. The Circuit Court of St. Louis County denied petitioner's petition for review without opinion. All grounds concerned within this writ for certiorari were asserted in the Circuit Court of St. Louis County. After timely appeal, the Court of Appeals for the Eastern District affirmed the Circuit Court's order. All constitutional issues raised in this Petition For Certiorari were raised before the Court of Appeals. The Court of Appeals assumed without deciding that the *Brady* v. *Maryland* rule is applicable to civil administrative proceedings citing McCormick *Evidence,* § 355 at 853 (1972). However, the Court of Appeals held:

> (a) Petitioner had failed to prove that the Commission had information which was suppressed;
>
> (b) That investigator McKee was to be viewed as a potentially exculpatory witness in a criminal case and therefore his conduct and his invocation of the Fifth Amendment were not attributable to the Commission; and

(c) That petitioner had failed to preserve error concerning McKee's failure to testify because McKee's deposition was admitted into evidence without objection and petitioner then failed to request that the deposition be stricken when McKee again invoked the Fifth Amendment when the attorney for petitioner attempted to cross-examine him.

The same Constitutional principles were raised in a timely request for transfer to the Missouri Supreme Court, which was denied by that Court on July 14, 1981.

REASONS FOR GRANTING THE WRIT

Petitioner's Right To Due Process In A Hearing Where His Livelihood Is At Issue Was Violated Where An Agency Investigator Took The Fifth Amendment In Depositions And At Trial Regarding Exonerating Evidence, And This Court Should Extend The Holding Of Brady v. Maryland To Apply To This Civil Administrative Action. AL MUELLER'S Occupation And Means Of Earning A Livelihood Is A Property Right Entitled To Protection Under The Due Process Clause Of The Fifth And Fourteenth Amendments Of The United States Constitution. Slochower v. Board of Higher Education Of The City Of New York, New York, 76 Sup.Ct. 637,350 U.S. 551, 100 L.Ed. 692 (1956). Constitutional Due Process Requires In The Administrative Context The Right Of Full Cross-Examination Of Adverse Witnesses And Confrontation Of Those Whose Statements Are Offered As Evidence. Goldberg v. Kelly, 397 U.S. 254, 90 Sup.Ct. 1011, 25 L.Ed.2d. 287 (1970).

In this case, James McKee, a State employee and investigator for The Missouri Real Estate Commission, told AL MUELLER in phone conversations which were recorded and offered into evidence that MUELLER was being railroaded and that McKee had enough evidence to throw the case one way or another. At trial, McKee refused to answer any questions other than those concerning his name and address when interrogated by the petitioner's attorneys. The attorney for The Real Estate Commission then tendered into evidence a previous deposition of McKee. When McKee was then cross-examined by appellants he refused to answer any questions including questions relating to the deposition testimony introduced into evidence. McKee's invocation of the Fifth Amendment during direct examination and then again on cross-examination denied the petitioners their right to due process.

The Missouri Court of Appeals Eastern District in its decision in this case, *Mueller* v. *Ruddy et al,* 617 S.W.2d 466, correctly

assumed, although it did not decide, that *Brady* v. *Maryland*, 373 U.S. 83 (1962) applied to civil administrative proceedings. After accepting the applicability of *Brady*, the Missouri Court of Appeals engaged in specious reasoning so as to avoid the logical effects of Brady upon this proceeding. The Court of Appeals held:

> "Appellants have not established that any exculpatory information was available to the Commission and suppressed by it." 617 S.W.2d. 466 at 476.

The "Catch 22" nature of this holding seems to have escaped the Appellate Court. The reason why appellants could not develop the exculpatory information which McKee admitted that he had was because McKee invoked his Fifth Amendment rights. There was evidence adduced which was supportative of MUELLER'S claim of being railroaded. McKee had told him in a bribe situation that this information was available. L. K. Wood, a commissioner of The Real Estate Commission, had called MUELLER a "crook" before the proceedings were initiated and Wood had told one of MUELLER'S employees during the investigation of the case that "we have been trying to get Al Mueller for years." Commissioner Wood apparently acknowledged this situation because he excused himself from the asessment of disciplinary action after the case was decided by the hearing commissioner.

The Court of Appeals in its decision dissociated McKee from the Commission and treated him as an independent potentially exculpatory witness in a criminal case. 617 S.W.2d. 466 at 476. While McKee was not a party in any legal sense, he was employed by the State of Missouri and acted at the direction of The Real Estate Commission. The Court of Appeals next concluded that any error concerning McKee's failure to testify had been waived by the failure of petitioner's attorney to object to the introduction of the deposition and by his subsequent failure to request that it be stricken. This entirely misses the point. The

question is not whether McKee's evidence should have been admissible against MUELLER, but rather MUELLER'S right to cross-examine McKee and his right to obtain exonerating information which McKee claimed he possessed.

Though the Missouri Court of Appeals assumed that *Brady* applied in this case, it failed to reason out its conclusions according to the dictates of *Brady*.

The United States Supreme Court stated in *Brady:*

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administrative justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done to its citizens in the Courts.' A prosecution that withholds evidence on demand of an accused, which if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady* v. *Maryland,* 373 U.S. 83, 87-88.

Though *Brady* involved a criminal case, its logic should apply whenever the State takes action which will deprive an individual of their life, liberty or property rights, including the right to a profession or a livelihood.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals Eastern District, where application for transfer has been denied by the Missouri Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

Case No. 78005
Case No. 78005-A

Missouri Real Estate Commission,
Petitioner,

vs.

Alfred W. Mueller,
Al Mueller Realty Co., and
David E. Windmueller,
Respondents.

Findings Of Fact,
Conclusions Of Law And Decision

Findings of Fact

1. Respondent Alfred W. Mueller is a licensed Missouri real estate broker. Respondent Al Mueller Realty Co., is the holder of a current real estate corporation license which is dependent upon Mueller's broker's license. Respondent David E. Windmueller is a licensed real estate salesman, holding his license through Mueller's broker's license.

2. Mueller is a shareholder, director and president of the Al Mueller Realty Co. He holds himself out to the public as doing real estate business through the corporation. Windmueller is employed by Mueller.

3. In June of 1977 Transamerica Insurance Co. acquired the ownership of some residential property in the city of St. Louis. The property is commonly referred to as 3767 Blow Street. This property was obtained through a foreclosure and was to be sold.

4. The two local officials for Transamerica who were to sell this property were Charles W. Haury, claims representative and his immediate superior, Richard Boll, branch manager. Both testified that the attorney who handled their foreclosure on the Blow Street property recommended they engage Mueller as their real estate agent to sell the property.

5. Both Haury and Boll had a phone conversation with Mueller, about the third week of June, 1977, wherein Mueller was to act as a real estate agent for Transamerica to sell the Blow Street property for approximately Thirteen Thousand - Fourteen Thousand ($13,000 - $14,000). Mueller agreed to represent Transamerica in this sale.

6. Haury again spoke with Mueller by phone during the last part of June, 1977. At that time Mueller recommended that Transamerica change the locks on the house. The locks were changed on June 23, 1977 and a set of keys were delivered to Mueller on June 25th.

7. Within a week after the delivery of the keys, Mueller called Haury. He said the house was in very bad condition and it would cost between Four Thousand to Five Thousand dollars ($4,000 - $5,000) to fix it up for sale. Haury was to discuss this with Boll. Mueller also spoke with Boll by phone during the week of July 5th (July 4, 1977 was on a Monday). At that time Mueller told Boll that in view of the property's poor condition, repairs would have to be made before it could be sold to an individual. Mueller said the repairs would cost between Four Thousand and Five Thousand ($4,000 - $5,000). If Boll was not interested in that approach, Mueller said he would try to interest a couple of contractors in the property. Even with the repairs, Mueller told Boll the property probably would not bring more than Sixteen Thousand - Seventeen Thousand dollars ($16,000 - $17,000).

8. Haury and Boll conferred during the first week of July 1977, and agreed to sell the house without repairs. Haury called

Mueller to tell him of that decision. Three to four days later, Mueller told Haury, by phone, that "the best price he could get for the house was Six Thousand Five Hundred dollars ($6,500)." Mueller also called Boll and told him that only one contractor showed any interest in the house (Mueller admitted showing the house to two contractors and soliciting offers from them) and "the best he could get" from that contractor was Six Thousand Five Hundred dollars ($6,500). This phone conversation took place on the 7th or 8th of July.

9. Shortly thereafter, Boll and Haury again conferred and agreed to sell the house for Six Thousand Five Hundred dollars ($6,500), what they thought was the best offer Mueller could get. Haury called Mueller close to the middle of July, "about two or three weeks after the locks were changed", and told Mueller to sell the house at Six Thousand Five Hundred dollars ($6,500). Mueller did not ask to buy the property himself nor did he ask permission to sell the property to someone in his office. Haury was of the opinion that Mueller was acting as Transamerica's real estate agent, selling the property to a buyer, although Mueller did not reveal the name of the buyer.

10. In the latter part of June, 1977, a young couple, (later married and hereinafter referred to as the Knittels) saw the Blow Street property with respondent's real estate sign in the front yard. Since they were looking for a home, they got the phone number from the sign and called respondent's office sometime during the last week of June. Mr. Knittel spoke with an employee of Mueller, Kathy Freiner. He was told the number of rooms, type of heat, etc., but when he asked about the price, Freiner told him, "they (Respondents) were trying to work out a price with the owners". Freiner also told him he could not see the property until the price was worked out with the owners. Mueller admits he had his sign in the front yard.

11. One week later, during the first week of July, Knittel again called Freiner and asked if they had come up with a price

in order for him to view the house. She said they had not come up with a price yet. During the second week of July Knittel again called Freiner, again asking about a price. This time he was told they were getting closer. Freiner admits having a couple of phone calls with the Knittels prior to showing them the property. She also stated that the property was listed "on the board" at Mueller's office indicating it was for sale.

12. On July 20, 1977, Kathy Freiner called the Knittels and showed them the Blow Street property. Freiner met them at the house, announced that she was working for Mueller and representing the owners (without mentioning the owner's names). She took them on a tour of the house and said that the owners wanted Twenty One Thousand, Nine Hundred dollars ($21,900) for the property. When the Knittels said they wanted to put in an offer to purchase at Eighteen Thousand Five Hundred dollars ($18,500), Freiner prepared an offer-to-purchase contract, on standard forms used by Respondents. The Knittels signed the offer-to-purchase agreement while at the house, however they were later asked to sign another similar contract at Respondent's office that evening since the first was filled in improperly. Respondent Windmueller directed Freiner in the preparation of the second contract. The Knittels paid One Hundred dollars ($100) to Freiner as earnest money when they signed on July 20th.

13. On July 22, 1977, Respondent Windmueller and another man, representing themselves as being from Al Mueller's office, went to Haury's office with an offer-to-purchase the Blow Street property. This agreement is Petitioner's Exhibit
The offer had been prepared by Windmueller, from information supplied by Mueller, on a standard form used by Respondents. The date on which the offer was prepared was July 21, 1977. Mueller changed that date to read July 11, 1977, before Windmueller took it to Transamerica's office. It granted Respondents a 6% commission. It also provided that the offer was to be accepted before July 23, 1977. Both Freiner and

Windmueller admitted that it is standard policy in Respondents' office to provide two days for acceptance. This same two-day provision was included in the Knittel offer, Petitioner's Exhibit #5.

14. Boll arrived at Haury's office about 4:30 or 4:45 p.m., Friday afternoon, July 22, 1977. The representatives from Mueller's office were already there with Petitioner's Exhibit #1 previously filled in and signed by the buyer, H. J. Merschmann. When presented with the offer-to-purchase, Boll noticed that the purchase amount was Six Thousand dollars ($6,000). He and Haury complained and Windmueller changed the figure to read Six Thousand Five Hundred ($6,500) and wrote the initials "H.J.M." near the correction. Boll then signed the contract, witnessed by Haury.

15. When Windmueller presented Petitioner's Exhibit #1 for Boll's signature, he did not tell Haury or Boll that Merschmann was Mueller's uncle and a salesman in Mueller's office. He introduced the gentleman with him as "Mr. Merschmann". At his deposition Windmueller said he went to Haury's office alone. At trial he said that another salesman from Mueller's office was present. The false Mr. Merschmann was also "presented as a contractor". Had either Boll or Haury known this information they would not have signed Petitioner's Exhibit #1. After signing, Boll asked "who got the earnest money" and was told "they (Respondents) would keep that as agent until the final sale was consummated." Boll and Haury were not told at the time they signed Petitioner's Exhibit #1, that two days earlier, on July 20, 1977, Respondents had obtained an offer to purchase the Blow Street property for Eighteen Thousand Five Hundred dollars ($18,500).

16. The closing of this real estate transaction was handled by Land Title Insurance Company of St. Louis. There were two closings but one general warranty deed prepared, when two deeds are normally used. (Petitioner's Exhibit #4.) The grantor

was Transamerica and the grantee was the Knittels. The deed was signed by Benno Leyrer, an employee of Transamerica, on September 15, 1977. He was designated to sign the deed on behalf of the company because both Haury and Boll were unavailable at the time. He knew nothing about the terms of the sale contained in Petitioner's Exhibit #1 except "the sale price was about Six Thousand dollars ($6,000)."

17. The closing statements for the Blow Street transaction were prepared by an employee at Land Title, Carol Herbold. At the time of trial, Herbold was no longer an employee at Land Title and testified on behalf of Respondents. There were two sets of closing statements. The first set contained a statement, wherein Transamerica was listed as Seller (Petitioner's Exhibit #7) and another statement showing "Al Mueller Realty Company" as the Purchaser (Petitioner's Exhibit #8). The latter exhibit was signed by Mueller. The first set was dated September 20, 1977, and involved the sales price of Six Thousand Five Hundred dollars ($6,500). The second set of closing statements are dated September 19, 1977. They relate to the same property but involve the sales price of Eighteen Thousand Five Hundred dollars ($18,500). The statement for the Seller (Petitioner's Exhibit #9) is in the name "Alfred W. Mueller, President of Al Mueller Realty" and was signed by Mueller. The Knittels were the Purchasers (Petitioner's Exhibit #10).

18. In the files of Land Title was a piece of paper dated August 26, 1977, signed by Merschmann, assigning his interest in the Blow Street property to Mueller for one dollar ($1.00). It was witnessed by Mueller's secretary. Mueller stated at the trial that Merschmann assigned his interest in the property when it became known that there was a lien on the property. However, Herbold testified that she did not discover the lien until after Leyrer had signed the deed on September 15, 1977.

19. Shortly after the closing, Haury and Boll first discovered that Mueller was the actual purchaser of the Blow Street property

from Transamerica. Haury went to Mueller's office to confirm this information and overheard Mueller explain the double transaction to the attorney that had originally recommended Mueller to Boll and Haury. A day or two later, Haury met Mueller at this attorney's office. At that meeting Mueller said he didn't know who bought the house, he didn't remember the exact name of the salesperson who sold the house and refused to disclose the sales price.

20. The investigator for Petitioner, James I. McKee, went to St. Louis a few days prior to the trial and spoke by phone with Mueller. McKee told Mueller he had some information that would be of value to Mueller, if he were willing to pay him some money. Mueller told McKee that he would be willing to pay Twenty Thousand dollars ($20,000) for this information. McKee and Mueller later met, at which time McKee played certain tape recordings he had made of interviews with Petitioners' witnesses, when he was investigating the case and which formed the basis of his report. After hearing the tapes Mueller concluded they had no value and paid McKee nothing. Respondents called McKee as a witness at the trial and he refused to answer questions under the privilege of the 5th Amendment of the U.S. Constitution. McKee does not have any information which Respondents have not seen or heard and which might be beneficial to their case.

21. Kathy Freiner received a commission from Mueller for the sale of the Blow Street property at a time when she was not a licensed real estate saleswoman. Mueller knew she was not licensed.

Conclusions Of Law

Count I

In Count I of the Complaint herein, Respondents have been charged with the violation of certain portions of Chapter 339, RSMo. 1969. More Specifically, Respondents are claimed to be

guilty of one or more of the following subsections of Section 339.100:

"(1) Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others;

(2) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts;

(5) Failing, within a reasonable time, to account for or to remit any moneys, valuable documents, or other property, coming into his possession, which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or demonstrates bad faith or gross incompetence."

There is competent and substantial evidence upon the whole record in this case to demonstrate that Respondents were guilty of intentional concealment with intent to defraud, *Dittmeier* v. *Missouri Real Estate Commission,* 237 S.W.2d 201 (St. L. App. 1951); of misrepresentations of silence, amounting to false representations, *Missouri Real Estate Commission* v. *Steger,* 509 S.W.2d 47 (Sup. 1974); of substantial misrepresentations, *Boyle* v. *Missouri Real Estate Commission,* 537 S.W.2d 603 (K.C. App. 1976); and of violating their fiduciary relationship with their customer by failing to make full and frank disclosure of all material facts, *Dittmeier* case and *Martin* v. *Hieken,* 340 S.W.2d 161 (St.L. App. 1960).

These wrongful activities of Respondents blend together to prove fraud. There is sufficient evidence in this case to prove that Respondents fraudulently concealed material information from Transamerica. They had a written offer to buy the property for $18,500 but did not disclose this to their principal at the time they presented a lesser offer to Transamerica. Transamerica relied upon Respondents' statement that the best price

Respondents had for the property was $6,500 and signed the sales agreement to their detriment. Although Petitioner has proven the various elements of fraud, there is no requirement for this degree of proof. Fraud, in this case, may be founded upon the principal-agent relationship. In *Frazer* v. *Glick*, 347 S.W.2d 385 (Sup. 1961) at loc. cit. 390, the Court said, "The rule is based on the idea of closing the door to the temptation to commit fraud. It tends to keep the agent's eye single and clear to the rights and welfare of his principal."

There is competent and substantial evidence to show that Respondents undertook to represent Transamerica as a real estate broker for the sale of the Blow Street property. They put their sign in the yard. They offered advice to Transamerica concerning the change of locks and possible repair of the premises. They showed the property to two contractors and solicited offers from them. The property was listed on the office "board". Mueller told Transamerica that "the best price he could get for the house was $6,500." Windmueller told Transamerica Respondents would keep the earnest money "as agent until the final sale was consummated." The contract between the parties granted Respondents a 6% commission. They held themselves out to the Knittels as agents for a principal.

The relationship of Respondents to their customer, Transamerica, "was the confidential and fiduciary relationship of principal and agent, which imposed upon the broker the obligations to be perfectly frank with its principals, to make a full and complete disclosure of all material facts concerning the transactions which might affect their decision to sell their property to the proposed purchaser, to be loyal to (their principals), and to exercise the utmost fidelity and good faith towards them." *Travagliante* v. *J. W. Wood Realty Company*, 425 S.W.2d 208, 212 (Sup. 1968) *The Restatement of Agency* 2d, Section 390 says that the "... disclosure must include not only the fact that the agent is acting on his own account ..., But also all other facts which he should realize have ... a bearing upon the desirability of the transaction from the viewpoint of the principal."

When Respondents obtained an offer to purchase the property from the Knittels for $18,500, they were under a duty to relay this offer to Transamerica. Not only did they fail to transmit this offer, they devised an assiduous concealment scheme. They prepared an offer to purchase for $6,500 in the name of Mueller's uncle, Merschmann, a salesman employed by Mueller. When they produced the contract for Transamerica's signature, they failed to disclose the relationship of the purported purchaser to Respondents. In *Curotto* v. *Hammack*, 241 S.W.2d 897 (Sup. 1951), the Supreme Court of Missouri held that a broker had the plain duty to disclose to his principal the fact that the buyer, produced by him, was his mother-in-law.

Mueller admits changing the date on the Transamerica contract. It is apparent from an inspection of the exhibit that the date was changed from July 21, to July 11. Respondents' denial that the $6,500 contract was executed after the Knittel's $18,500 contract is not persuasive. Both contracts contained a standard two-day acceptance period. Windmueller and Freiner admitted this was customarily done when preparing contracts on Respondents' forms. The Knittel contract is dated July 20, 1977 and has an acceptance date of July 22. The acceptance date on the Transamerica contract is July 23, 1977, supporting the date of July 21st, as the date of preparation.

Before the deed was executed, Merschmann, Mueller's uncle, assigned his interest in property to Mueller. The closing statements were prepared showing Mueller to be the purchaser from Transamerica and the simultaneous seller of the property to the Knittels for a $12,000 profit. There is substantial and competent evidence that Respondents never disclosed to Transamerica that Mueller was to be the real purchaser of the property. This is virtually the same facts as in *Dittmeier, supra.* In that case the Court said at l.c. 206 that "fraud may be shown by concealment with intent to defraud as well as by misrepresentation if such concealment is material."

In the *Dittmeier* case, as here, the broker failed to disclose to his principal that he had previously sold the peoperty he was selling for the principal. The Court said in *Dittmeier* that even if the contract to sell to the second buyer had not been consummated, it was the broker's duty to reveal the fact that this prospective buyer was interested in the property. Even if the Knittel contract was not consummated until July 20, 1977, Respondents knew they were interested in the property as prospective buyers as early as the last week of June. It was Respondents' duty to reveal this fact to Transamerica. As the Court said in *Dittmeier*, loc. cit. 207, "This alone is sufficient to justify the finding of a violation of (the Real Estate Licensing Law)."

Respondents improperly obtained the $12,000 profit that should have been remitted to Transamerica. In *Utlaut* v. *Glick Real Estate Co.*, 246 S.W.2d 760, 763 (Mo. 1952), the Missouri Supreme Court said, "An agent who secretly purchases the subject of the agency through a straw party and sells it at a profit, or otherwise secretly deals with the property to the disadvantage of his principal, forfeits his right to commission and must account for his profit."

Respondents are guilty of all charges in Count I.

Count II

Section 339.150 RSMo. 1969 reads as follows:

> "No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the State of Missouri."

There is substantial and competent evidence that Kathy Freiner received fees from Mueller for services as saleswoman, when in fact she was not duly licensed. Freiner admits she had several phone calls by the Knittles inquiring about the Blow Street property. She later showed them the property and held herself out to the Knittels as a real estate agent representing the owners of the property. She prepared the offer-to-purchase contract and obtained the Knittels' signatures. She took the Knittels earnest money. All of these activities were done while Transamerica was the owner. When Mueller paid Freiner a commission for the property, he knew she was not licensed.

As the Court said in *Miller Nationwide Real Estate Corp.* v. *Sikeston Motel Corp.*, 418 S.W.2d 173 (Sup. 1967), the purpose of Section 339.150 "is to control and restrict the class of persons to whom a licensed broker may pay a part of his commission." Mueller was prohibited by this section from paying a portion of his commission to his unlicensed employees because Chapter 339 was enacted "to protect the public from the evils of fraud and incompetency" *Gilbert* v. *Edwards*, 276 S.W.2d 611, 617 (St.L. App. 1955). Mueller, by knowingly employing a non-licensed employee to act as real estate saleswoman, was in violation of Chapter 339 and was in direct violation of Section 339.150 when he paid Freiner a commission. His actions were detrimental to the interest of the public and are grounds for discipline.

Decision

It is the decision of this Commission that the Respondents have acted in violation of Chapter 339, and therefore their licenses are subject to disciplinary action by the Petitioner.

DATED this 12th day of January, 1979.

/s/ MICHAEL C. HORN
ADMINISTRATIVE
HEARING COMMISSIONER

APPENDIX B

BEFORE THE
MISSOURI REAL ESTATE COMMISSION

In The Matter Of
Alfred W. Mueller,
License No. 5998
Al Mueller Realty Company,
License No. 1726, and
David E. Windmueller,
License No. 55808

Order

Now on this 19th day of April, 1979, the Missouri Real Estate Commission finds:

1. That on January 12, 1979, after a full evidentiary hearing, the Missouri Administrative Hearing Commission entered its Findings of Fact, Conclusions of Law and Decision in the case of Missouri Real Estate Commission vs. Alfred W. Mueller, Al Mueller Realty Co., and David E. Windmueller, Case Numbers 78005 and 78005-A.

2. The Administrative Hearing Commission decided that respondents acted in violation of Chapter 339, RSMo, 1969 and that their licenses were subject to disciplinary action by this Commission.

3. Upon proper notice having been given to respondent, David E. Windmueller, this Commission held a hearing pursuant to Section 161.292, RSMo as amended, on February 23, 1979, for purposes of determining the appropriate disciplinary action to be taken in this case regarding this respondent. Respondent, David E. Windmueller, did not appear. Affidavits submitted by him in lieu of his appearance were accepted into evidence by this Commission.

4. Upon proper notice having been given to respondents, Alfred W. Mueller and Al Mueller Realty Co., this Commission held a hearing on March 26, 1979, for purposes of determining the appropriate disciplinary action to be taken in this case regarding these respondents. Respondent Mueller appeared with counsel and evidence was offered.

Therefore, having duly adopted the Administrative Hearing Commission's Findings of Fact, Conclusions of Law and Decision and giving full consideration to the evidence submitted at the disciplinary hearings, upon consideration of the entire record, it is the Order of the Missouri Real Estate Commission that:

1. The license of Alfred W. Mueller, Number 5998 is hereby revoked.

2. The license of Al Mueller Realty Company, Number 1726 is hereby revoked.

3. The license of David E. Windmueller, Number 55808 is hereby suspended for one (1) calendar year.

The above disciplinary measures shall become effective twenty-five days following the entry of this Order and the licenses shall be surrendered to this Commission immediately thereafter.

MISSOURI REAL ESTATE COMMISSION

/s/ By: JOHN J. RUDDY
Commissioner

/s/ RALPH H. SLAVENS
Commissioner

APPENDIX C

In The
Circuit Court
County of St. Louis, Missouri

Alfred W. Mueller, etal

vs.

Number 422848

John J. Ruddy, etal

August 27, 1979

Division 12

Plaintiff's Petition For Review of Administrative Agency Action heretofore argued and submitted is hereby denied and the Order of the Missouri Real Estate Commission is affirmed.

The Stay Order of May 4, 1979 is continued in force for 30 days to enable the plaintiff to perfect his Appeal if he desires to do so. If said Appeal is perfected then said Stay Order shall remain in affect until further order of the Missouri Court of Appeals.

Cost against Plaintiff.

CC- David Danis - Attorney for Petitioner
Eugene Bushman - Attorney for Defendant
Jerry Short - Asst. Atty. Gen.

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Attorney

phone_____

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Judge

_____
Attorney

Phone_____

APPENDIX D

Alfred W. Mueller, and Al Mueller Realty Company, Plaintiffs-Appellants,

v.

John J. Ruddy, and Ralph H. Slavens, and L. K. Wood, Comprising The Missouri Real Estate Commission, Defendants-Respondents.

No. 42039.

Missouri Court of Apeals,
Eastern District,
Division Four.

April 14, 1981.

Motion for Rehearing and/or Transfer to Supreme Court Denied May 15, 1981.

Application to Transfer Denied July 14, 1981.

* * * * * * * *

SATZ, Judge.

This is an appeal from a decision of the circuit court affirming an order of the Missouri Real Estate Commission (Commission). Appellants are Alfred W. Mueller (Mueller) and Al Mueller Realty Company (Realty Company). The Realty Company's real estate license is dependent upon Mueller's license.

The Commission filed a two-count petition with the Administrative Hearing Commission, charging Mueller, and, in turn, the Realty Company, with violating certain provisions of the Real Estate Agents and Brokers Act, Chapter 339 RSMo

1969.[1] In Count I, the Commission alleged that Mueller was engaged by Transamerica Insurance Company (Transamerica) as an agent to sell a house for Transamerica and, as Transamerica's agent, Mueller fraudulently concealed from Transamerica an offer on the house and Mueller's status as the actual purchaser of the house from Transamerica. In Count II, the Commission charged Mueller with violating § 339.150 RSMo 1969. The Commission alleged that Mueller compensated unlicensed sales persons for selling real estate for him. The Hearing Commissioner (Commissioner) found Mueller and the Realty Company guilty on both counts. His decision was referred to the Commission, and the Commission revoked the real estate licenses of Mueller and the Realty Company. The circuit court affirmed the Commission's order. We affirm the judgment of the circuit court.

On appeal, appellants raise 10 main points and multiple subpoints. To address these points, we excerpt without quotation marks and paraphrase, in part, the pertinent findings of the Commissioner's Findings of Fact.

Alfred W. Mueller is a licensed Missouri Real Estate broker. Al Mueller Realty Company is a holder of a current real estate corporation license which is dependent upon the broker's license of Alfred Mueller. In June of 1977, Transamerica acquired the ownership of some residential property on Blow Street in the City of St. Louis. Two local officials of Transamerica were to dispose of the property: Charles W. Haury, a

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[1]Apparently, the proceeding was intitiated and processed pursuant to §§ 161.252 et seq. RSMo 1978. The Real Estate Commission initiates the action before the Administrative Hearing Commission. §§ 161.272 and 161.282. A Hearing Commissioner makes Findings of Fact and Conclusions of Law § 161.292, which then serve as the basis for the initiating Real Estate Commission to order appropriate disciplinary action. § 161.292. All statutory references are to RSMo 1978, unless otherwise indicated.

claims representative, and his immediate superior, a branch manager, Richard Boll. An attorney recommended Boll and Haury engage Mueller as a real estate agent to sell the property. In late June of 1977, both Haury and Boll had phone conversations with Mueller during which each asked Mueller to represent Transamerica in the sale of the property. Mueller agreed to do so.

Later in June, Haury spoke again with Mueller. Mueller recommended that Transamerica change locks on the house. The locks were changed and a set of keys were delivered to Mueller. Within a week after the delivery of the keys, Mueller called Haury to tell him the house was in very bad condition and it would cost between $4,000 and $5,000 to recondition it for sale. Mueller also spoke with Boll by phone during the week of July 5th and told him essentially the same story. Mueller told Boll that he would try to interest a couple of contractors in the property if Boll was not interested in repairing the property. In the first week of July, Haury and Boll conferred and decided to sell the house without repairs. Haury called Mueller to inform him of that decision. Three to four days later, Mueller phoned Haury and told him that the best price he, Mueller, could get for the house was $6,500. On July 7th or 8th, Mueller phoned Boll, told him that only one contractor showed any interest in the house and also told him the best he, Mueller, could get from that contractor was $6,500. Shortly thereafter, Boll and Haury conferred again and decided to sell the house for $6,500 because they believed that was the best price Mueller could get. Around the middle of July, Haury called Mueller and told him to sell the house for $6,500. Mueller did not ask to buy the property himself nor did he ask permission to sell the property to someone in his office.

In the latter part of June, 1977, a young couple, Robert Knittel and his fiancee (Knittels) saw the property on Blow Street with Mueller's real estate sign in the front yard. They obtained Mueller's phone number from the sign and, some time during

the last week of June, Mr. Knittel called Mueller's office. Knittel spoke with an employee of Mueller, Kathy Freiner. Freiner was not a licensed real estate saleswoman. Freiner told Knittel the owners had not set a price on the property and he would not be able to see the property until the price was set. During the first two weeks of July, Knittel talked to Freiner asking about the price and she responded that they were getting closer to establishing a price. On July 20, 1977, Feiner showed the Knittels the property. Freiner met them at the house, announced that she was working for Mueller and that she represented the owners, who remained unnamed. After a tour of the house, the Knittels signed an "offer-to-purchase" contract on a standard form prepared by Freiner. The purchase price was $18,500. H. J. Merschmann, a licensed salesman employed by Mueller, was listed as seller on the contract. The Knittels paid $100 to Freiner as earnest money when they signed the contract on July 20th. After the sale was completed, Freiner received $300 from Mueller for her services in selling the property. Freiner testified that the property was listed on the board at Mueller's office, indicating it was for sale.

On July 21, 1977, Mr. Windmueller, a salesman in Mueller's office, prepared an "offer-to-purchase" contract on the Blow Street property. The contract listed H. J. Merschmann as the purchaser.[2] The contract, a standard form, provided that Mueller would receive a 6 percent commission and also required the offer be accepted by July 23, 1977. Mueller changed the date of the contract to read July 11, 1977, before Windmueller took the contract to Transamerica's office. When Windmueller presented the contract for Boll's signature, he did not tell Boll

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[2]Merschmann was listed as purchaser on both the copy of the contract from the files of the title company and the copy of the contract from Transamerica's files. However, the copy of the contract from the files of the title company also had an arrow drawn from the name Al Mueller Realty Co. to the line designated for the purchaser. The arrow does not appear on the copy from Transamerica's files.

or Haury that the buyer, Merschmann, was Mueller's uncle and was a salesman in Mueller's office. After signing the contract, Boll asked who was to receive the earnest money and he was told Mueller would keep it as agent until the final sale was consummated. Boll and Haury were not told at the time they signed this contract that two days earlier, on July 20, 1977, Mueller had obtained an offer to purchase the property for $18,500.

On August 26, 1977, Merschmann made a written assignment of his interest in the Blow Street property to Mueller for $1.00. The assignment was witnessed by Mueller's secretary.

At the time of the closing, neither Boll nor Haury was available, to sign for Transamerica, as the grantor. Another employee, Benno Leyrer, signed the deed in behalf of the company. Leyrer knew nothing about the terms of the sale except that the price was about $6,000. Only one deed was executed. Transamerica was the grantor and the Knittels were the grantees. However, there were two sets of closing statements. The first set contained a statement showing Al Mueller Realty Company as the purchaser. The first closing statement was dated September 20, 1977, and reflected a sale price of $6,500. The second set of closing statements was dated September 19, 1977. They reflect the same property but show a sale price of $18,500. The statement for the seller is in the name of Alfred W. Mueller, president of Al Mueller Realty Company and was signed by Mueller. The Knittels were the purchasers.

The Commissioner found that Mueller became Transamerica's agent to sell the Blow Street property, and, as an agent, Mueller, and, in turn, the Realty Company, fraudulently concealed from Transamerica Mueller's identity as the purchaser of the property[3] and the offer on the property. He also concluded Mueller improperly compensated Freiner for her services.

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[3] From the operative facts, the Commissioner inferred that Merschmann, Mueller's uncle, purchased the property as a straw party for Mueller.

[1] Appellants first attack the sufficiency of the evidence. To determine the merits of this attack, we review the findings and decision of the Commissioner not the judgment of the trial court. *See Ingram* v. *Civil Service Comm'n of St. Louis,* 584 S.W.2d 633 (Mo.App.1979). We defer to his views on the credibility of witnesses and we view the evidence and all reasonable inferrences in the light most favorable to his findings. *E.g., Dittmeier* v. *Missouri Real Estate Commission,* 237 S.W.2d 201, 203 (Mo.App.1951). We may not substitute our judgment of the evidence for that of the Commissioner and we may not set aside his decision unless it is not supported by substantial evidence, or unless it reflects an abuse of discretion or is not authorized by law. *E.g., Missouri Real Estate Comm'n* v. *Steger,* 509 S.W.2d 47, 49 (Mo.1974).

Appellants' attack on the sufficiency of the evidence is two-pronged. Appellants argue there was insufficient evidence to show Transamerica had authorized either Boll or Haury to hire Mueller as an agent; and, if this authority existed, appellants argue, there was insufficient evidence to show an agent/principal relationship was created. These arguments are not persuasive.

[2, 3] Contrary to appellants' first contention, there was evidence to show Boll had authority to hire Mueller as an agent for Transamerica. Mueller states that neither Boll or Haury had authority to sign a listing agreement. However, the transcript pages to which he refers do not support this statement. Indeed, Boll testified that he probably could have signed a listing contract. Admittedly, no listing contract was signed. However, a written contract is not needed to create an agent/principal (broker/client) relationship. *See Roberts* v. *Gilchrist,* 397 S.W.2d 705, 709 (Mo.App.1965). More important, Boll did testify he had final responsibility for the disposal of the Blow Street property. Boll, in turn, authorized Haury to locate a real estate agent. Neither Boll nor Haury was questioned about the extent of his authority on cross-examination. Absent any con-

flict on this issue, any burden the Commission may have had was satisfied by Boll's testimony.

[4] Appellants' second contention is also contradicted by the record. There was substantial evidence to show Mueller was hired as an agent. Brokers normally act as agents for their clients. *White* v. *Miriam Realty Co.*, 547 S.W.2d 184, 197 (Mo.App.1977). Thus, a broker/client relationship and its creation is normally no different than an agent/principal relationship and its creation. *See, e.g., Utlaut* v. *Glick Real Estate Co.*, 246 S.W.2d 760, 763 (Mo.1952). The relationship is created by consent. One person manifests his consent that another shall act on his behalf and be subject to his control. The other person manifests his consent to so act. Manifestation of consent may be by conduct. *Id.* at 763. This manifestation depends upon what the parties say and do and not necessarily what they subjectively intend. *Groh* v. *Shelton*, 428 S.W.2d 911, 916 (Mo.App.1968); Seavey, *Agency*, § 20, p. 37 (1964). The conduct of the parties in the present case manifested reciprocal consent creating an agent/principal relationship.

[5] Initially, Boll and Haury instructed Mueller to find a buyer for the Blow Street property. Reasonably interpreted, this instruction to Mueller, a real estate broker, was an authorization to act as an agent to sell the property. The record shows Mueller so construed the instruction, accepted the authorization and acted as an agent. Haury testified that, during a phone conversation, Mueller agreed to represent Transamerica. Mueller took possession of the keys to the property; he solicited offers on the property; his realty sign was placed in front of the property; the property was listed on the listing board in his office; and his employee showed the property to prospective purchasers. Reasonably construed, the acts are a collective manifestation of consent completing the agency relationship. *See Utlaut* v. *Glick Real Estate Co., supra* at 763; *Seavey, supra* at 37. Furthermore, at the hearing, Mueller admitted he acted as an agent for Transamerica. Arguably, his admission encom-

passes assumptions about the law. However, his statement was not his opinion on an abstract question of law; rather it was his application, as a real estate broker, of agency standards to the facts of this case. As such, it suggests what he thought the facts were, and, because he is a party to this action, the factual underpinning of his statement should not be ignored merely because his statement indicates his assumption about the law. *See Grodsky* v. *Consolidated Bag Co.*, 324 Mo. 1067, 26 S.W.2d 618, 621 (1930); McCormick, *Evidence*, § 265, p. 633 (1972). Mueller did state he terminated the agency relationship before any duty to disclose arose. However, Boll and Haury testified that Mueller did not renounce his agency. The Commissioner chose to believe Boll and Haury. We find no reason to disturb the Commissioner's determination that Mueller was Transamerica's agent.

[6] Appellants next complain the Commissioner erroneously "found appellant fraudulently concealed material information from Transamerica . . . while acting as their agent because this finding is not supported by substantial and competent evidence." This complaint mixes fact findings with conclusions of law. Appellants really contest the findings of fact upon which the conclusions of law are based. This complaint is without merit.

Appellants contend the finding of Mueller's failure to disclose the true identity of the purchaser was based solely on the testimony of Haury which was so "contradictory" that it was not credible. Contrary to this contention, Haury and Boll both testified that, at the time the "offer-to-purchase" contract was presented for Transamerica's acceptance, they were unaware the purchaser was a salesman from Mueller's office and that he was Mueller's uncle. According to their testimony, the true identity of the purchaser was learned only after the subsequent sale of the property to the Knittels had been completed. Admittedly, Mueller's testimony contradicted the testimony of Boll and Haury. The Commissioner chose to believe Boll and Haury

and the reasonableness of this belief was not vitiated by any real contradiction in Haury's testimony. Appellants' examples of conflict in Haury's testimony are either facially not contradictory or are easily reconcilable.

Appellants also contest the finding that Mueller failed to disclose the Knittels' offer to Transamerica. Mueller does not dispute that he knew of the Knittels' offer before the written contract between Mueller's uncle and Transamerica was signed. However, Mueller contends he entered into an oral agreement with Transamerica to sell the property for $6,500 some two weeks prior to receiving the Knittels' higher offer, and Mueller also contends he informed Transamerica he would be the purchaser. As noted, Boll and Haury testified that Mueller did not disclose he would be the purchaser. The Commissioner chose to believe them rather than Mueller. Furthermore, Haury's authorization to Mueller to sell the house for $6,500 was based upon Mueller's representation that $6,500 was the best price Mueller could get for the house. Once the Knittels expressed an interest in or made an offer on the house, Mueller, as an agent, had the continuing duty to disclose the interest and offer to Transamerica. We see no reason to disturb the findings of the Commissioner.

[7] Nor do we find a reason to disturb the conclusion of the Commissioner that Mueller fraudulently concealed this information in violation of the relevant statutes. Mueller was Transamerica's agent and, thus, had a fiduciary duty to Transamerica. *See Travagliante* v. *J. W. Wood Realty Co.*, 425 S.W.2d 208, 212 (Mo.1968). Mueller breached this duty by failing to disclose he was buying the property himself through a straw party. *See Utlaut* v. *Glick Real Estate Co., supra* at 763. Mueller also breached this duty by failing to disclose to Transamerica the offer made by the Knittels. *See Dittmeier* v. *Missouri Real Esate Comm'n*, 237 S.W.2d 201, 207 (Mo.App.1951). Either of these breaches of duty would constitute a violation of § 339.100 RSMo 1969, justifying

disciplinary action by the Real Estate Commisison. *See* § 339.100 RSMo 1969. It is not necessary to establish common law fraud. *Boyle* v. *Missouri Real Estate Comm'n.*, 537 S.W.2d 603, 612 (Mo.App.1976).

Next appellants challenge the finding that Mueller paid fees which he received from the sale of real estate to a person not holding a real estate license. The relevant statute provides:

> "No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person . . . unless such person is a licensed real estate salesman . . ." § 339.150 RSMo. 1969.

Appellants apparently do not dispute the fact that Mueller paid an unlicensed person $300 when the subject property was sold for services rendered showing the property and dealing with the buyer. Rather, appellants contend this payment was outside the scope of the statute. They argue that Mueller received no fee or commission for the sale of the property and thus could not pay a part of such fee to anyone. We disagree.

[8] The provisions of Ch. 339, including § 339.150 RSMo 1969, were enacted to protect the public from fraud and incompetence. *Gilbert* v. *Edwards*, 276 S.W.2d 611, 617 (Mo.App.1955). They will be strictly construed against anyone claiming to be exempt from the provisions. *Id. See also Miller Nationwide R. E. Corp.* v. *Sikeston Motel Corp.*, 418 S.W.2d 173, 177 (Mo.1967).

[9] Obviously, the rationale behind § 339.150 RSMo 1969 is to protect the public from dealing with unlicensed salespeople by taking away the pecuniary incentive for unlicensed people to sell to the public. Typically remuneration for selling would come out of a share of a broker's commission. Here, however, income was produced because of the profit on resale. Arguably, the Commissioner's findings and conclusion of an agency rela-

tionship between Transamerica and Mueller necessarily imply Mueller is holding this profit in a constructive trust for Transamerica, and, therefore, in a strict literal, legal sense Mueller has not received "compensation" from the sale of the Blow Street property. However, Mueller, cannot use his own wrongdoing to avoid the sanctions of this statute. Thus, we find this profit is "other compensation" within the meaning of §339.150 RSMo 1969. Mueller, while acting as an agent for a third party, paid an unlicensed person for services rendered selling real estate. This payment was made from the only compensation Mueller received on the sale, and such payment is prohibited by § 339.150 RSMo 1969.

[10, 11] Appellants' next contentions center on alleged procedural irregularities which, they contend, require reversal. Appellants cite *Rose* v. *State Bd. of Healing Arts,* 397 S.W.2d 570 (Mo.1965) and argue their procedural due process rights were violated because there was an "appearance of unfairness" in the proceedings. Appellants misconstrue the *Rose* case. In *Rose,* the court simply stated the circumstances there belied "even an appearance of unfairness leading to a denial of due process." *Id.* at 575. Of, course, appellants are entitled to procedural due process. This requires a meaningful opportunity for appellants to be heard, which includes the right to an impartial decision maker, the right of appellants to know the claims against them and the right to confront and cross-examine opposing witnesses and to rebut their testimony with appellants' own evidence. *Tonkin* v. *Jackson County Merit System Comm'n.,* 599 S.W.2d 25, 32-33 (Mo.App.1980). Since decisions rendered by an administrative body are presumed to be valid, appellants carry the burden of overcoming this presumption by establishing unfairness in the procedure. *See Moore* v. *Bd. of Educ. of Special School Dist.,* 547 S.W.2d 188, 191-192 (Mo.App. 1977). Appellants have not sustained this burden.

[12] First, appellants charge the chairman of the Commission, L. K. Wood, with personal bias against them. Citing the

record, appellants contend Wood attempted to withhold the real estate license of a witness until she would make a statement against appellants and contend Wood threatened to invoke his fifth amendment privilege instead of disclosing a fact crucial to appellants' defense. We have read the record. It does not support appellants' contentions. Apparently, prior to becoming chairman of the Commission, Wood did refer to Muelier as a "crook." However, Wood only participated in the decisions to initiate an investigation of appellants and to file a complaint with the Administrative Hearing Commission. After the process was initiated, appellants' hearing was conducted by a Commissioner whose impartiality is not questioned. Wood only participated in the hearing as a witness called by appellants. Moreover, he did not participate in the Commission's subsequent decision to revoke appellants' license. Thus, regardless of the inferential weight given to Wood's isolated characterization of Mueller, there is no showing of any improper influence on the adjudicatory processes of the Commissioner or of the Commission. Absent such evidence, we will not reverse. *See Moore* v. *Bd. of Educ. of Special School Dist.*, 547 S.W.2d 188, 191-192 (Mo.App.1977).

[13] Appellants next argue it was the Commission's practice to give notice prior to filing charges with the Administrative Hearing Commisison. Appellants attack the Commission's failure to follow this practice in the present case. Accordingly to the record, this practice was followed in only 40 percent of the cases in which the Commission filed charges. At best, it is questionable whether the Commission's omission in the present case was a deviation from the norm. In any event, appellants received a copy of the charges and, thus, "notice" of the charges prior to the hearing before the Commissioner. That is all the notice due process requires. *See Tonkin* v. *Jackson County Merit Selection System Comm'n., supra* at 332-33.

[14] Appellants next complain about the conduct of James McKee, an investigator for the Commission. Prior to the hear-

ing before the Commissioner, McKee told Mueller that he had "enough evidence to turn [the case] one way or another" and offered to sell Mueller the evidence. Subsequently, at his disposition, McKee asserted his fifth amendment privilege against self-incrimination and refused to answer questions about this conversation with Mueller, a conversation with L. K. Wood, and a conversation with Eugene Bushmann, attorney for the Commission. Appellants filed a combined motion to dismiss or strike the Commission's petition or to stay the proceedings against them indefinitely on the grounds that McKee's refusal to answer constituted a violation of appellants' right to discovery guaranteed by the due process clauses of the United States and Missouri Constitutions and by § 536.073 RSMo 1978. The Commissioner overruled this motion. Appellants contend this ruling was error.

Appellants' argument is based upon an extension of the rule enunciated in *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1962). The underlying principle in *Brady* was the avoidance of an unfair trial of the accused. *Id.* at 87, 83 S.Ct. at 1196. The court stated a prosecutor should not be "an architect of a proceeding that does not comport with the standards of justice," *Id.* at 88, 83 S.Ct. at 1197, and the court condemned the prosecutor's suppression of evidence which was material to guilt or punishment. *Id.* at 87, 83 S.Ct. at 1196. Appellants would extend the logic and enlarge the application of this rule. Appellants argue the Commission here was in position similar to the position of the government in *Brady*. McKee was an investigator for the Commission and, therefore, appellants reason, his conduct was the Commission's conduct. McKee claimed to have exculpatory information, and, at the same time, he blocked appellants' access to this information by his refusal to testify about that information at his deposition. Thus, appellants argue, McKee's refusal, in effect, was suppression of exculpatory information by the Commission. The present case is distinguishable from *Brady* and appellants' requested dismissal or indefinite stay of these proceedings was not warranted.

For our purposes here, we assume without deciding that the *Brady* rule is applicable to a civil administrative proceeding.[4] Nonetheless, application of the precise rule articulated in *Brady* would not require a dismissal here. Appellants have not established that any exculpatory information was available to the Commission and was suppressed by it. *See Brady* v. *Maryland, supra* at 87, 83 S.Ct. at 1196; *see, e. g., State* v. *Greenlaw,* 593 S.W.2d 641, 643 (Mo.App.1980). Moreover, we have no convincing evidence that any relevant information was withheld. Here, we have only McKee's claim that he had information favorable to appellants. At best, the reliability of this claim is questionable. In his deposition, McKee denied he had any information which might benefit appellants. In addition, Mueller testified McKee showed him the alleged exculpatory information and it "wasn't worth 20 cents to [him]."

[15, 16] More important, this alleged information is not in the Commission's files or under its control. The Commission turned over to appellants all of McKee's reports. This is not the case, for example, where a Commission has claimed to have exonerating information. Admittedly, McKee was employed by the state and worked at the direction of the Commission. However, McKee cannot sensibly be equated with the Commission nor can his actions sensibly be considered to be the actions of the Commission. The Commission cannot compel McKee to forego his constitutional privilege not to incriminate himself. Thus, his assertion of his privilege renders any information pro-

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[4] Appellants have cited no authority which extends the *Brady* rule to an administrative proceeding. Our research has disclosed no Missouri case to support this extension. However, *McCormick* states, with supporting cases, that "exculpatory information in an agency's possession or file data which may aid respondent's preparation or presentation of his case must be disclosed by the agency. The alternative is to drop the prosecution against the respondent. Anything less would violate the commands of procedural due process which every adjudication must observe." McCormick, *Evidence* § 355 at 853 (1972), and cases cited at 853, n.8.

tected by his assertion as unavailable to the Commission as it is to appellants. In short, McKee's assertion of his privilege against self-incrimination was not and cannot be equated to the state's suppression of evidence. Rather, his action is more closely akin to a potentially exculpatory witness asserting the privilege in a criminal case. The assertion creates a tension between the witness's privilege and the accused's right to discovery. When this tension arises, the witness's privilege prevails and the defendant must defend himself without the benefit of the witness's testimony. *See State* v. *Wilkinson,* 606 S.W.2d 632, 636 (Mo.banc 1980).[3]

Appellants' next contention is also based upon the assumption that McKee's conduct is imputable to the Commission and his invocation of the fifth amendment was, in effect, the Commission's invocation. Therefore, appellants reason, the pro-

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[3] Appellants maintain that the rationale of *Brady* as developed in dicta in *Earl,* v. *U. S.,* 361 F.2d 531, 534 (D.C.Cir.1966) and *People* v. *Sapia,* 41 N.Y.2d 160, 391 N.Y.S.2d 93, 359 N.E.2d 688 (N.Y.1976) support their position. We find no support for appellants in either case. In *Earl,* the court held the judiciary had no power to order the executive branch to grant immunity to a potentially exculpatory defense witness and also held the refusal of the executive branch to grant such immunity did not deprive the defendant of a fair trial. *Earl* v. *U. S., supra* at 534. Here, not only would this court lack the power to compel a grant of immunity, the Real Estate Commission would lack the authority to make such a grant. The only language in *Earl* which might be considered remotely favorable to appellants appears as dicta in a footnote where the court indicates due process might be lacking if the state were to grant immunity to a prosecution witness, yet refuse it to a defense witness. *Id.* at 534, n.1. That situation is not present in or analogous to the instant case. Similarly, in *People* v. *Sapia, supra,* the court of appeals of New York held a defendant was not deprived of due process by the failure of the state to grant immunity to a potentially favorable witness. *Id.* 359 N.E.2d at 692. It indicated the result might be different if the witness were a law enforcement agent. *Id.* Again, however, we note that the Real Estate Commission cannot grant "immunity" to McKee. The Commission is not blocking appellants' access to McKee. Hence, the principles of fairness suggested in dicta in the immunity cases are not applicable.

ceedings should have been dismissed because the Commission, as the moving party, had, on the one hand, initiated the proceedings, and, on the other hand, had refused to reveal information which might be detrimental to its claim. *See Geldback Transport Inc.* v. *Delay,* 443 S.W.2d 120, 121 (Mo.1969); *Franklin* v. *Franklin,* 365 Mo. 442, 283 S.W.2d 483, 486 (1955). Appellants' reliance on *Geldback* and *Franklin* is misplaced. The Commission is a party to the action but, as demonstrated, McKee is not the Commission. He will not benefit from the litigation and, indeed, he has not sought relief through the administrative or judicial process. *Geldback Transport Inc.* v. *Delay, supra* at 121; *Franklin* v. *Franklin, supra* at 486.

[17] Appellants next contend they were precluded from cross-examining McKee at trial and, therefore, their due process rights and statutory right to cross-examination were violated. We disagree. Appellants called McKee as a witness. In response to an inquiry, McKee indicated it was his intention to invoke his fifth amendment privilege "with regard to any question concerning this investigation . . . ."The Commission's counsel then proceeded to question McKee and, using McKee as a sponsor, he offered McKee's deposition into evidence. Appellants' counsel stated he had no objection because he believed McKee was now the Commission's witness.[6] After admission of McKee's deposition into evidence, appellants' counsel again questioned McKee and McKee again invoked his fifth amendment privilege. Appellants' counsel had no objection to the admission of McKee's deposition, and he did not ask the Commissioner to strike the deposition when McKee again invoked his fifth amendment privilege after the deposition was admitted into evidence. This complaint is without merit. *See, e. g., State* v. *Battles,* 607 S.W.2d 723, 728 (Mo.App.1980).

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[6] At this point counsel engaged in a discussion as to whether McKee became the Commission's witness or remained appellants' witness. His status was never resolved, but it is not determinative of this issue.

Appellants also complain about "the inclusion by McKee in Knittel's statement [taken by McKee] that Kathy Freiner had told the Knittels that the seller's name was Smith when this was not true." However, appellants make no further argument to explain why this alleged irregularity prejudiced them. Assuming this was a procedural impropriety, we will not reverse absent a showing of prejudice. *See Coffman* v. *Faulkner,* 591 S.W.2d 23, 26 (Mo.App.1979).

[18, 19] Next appellants complain the Commission failed to disclose to them numerous exhibits and witnesses required by a pretrial order. It is questionable whether this point has been preserved for review. First, we have not been supplied with a copy of the pretrial order to which appellants refer; thus, analysis of whether disclosure was required is impossible. The Commission contends no pretrial order was violated. Second, appellants have not indicated in their point or their argument which exhibits and what testimony were improperly admitted into evidence. We are not required to search the record to find support for appellants' point. *Brewer* v. *Blanton,* 555 S.W.2d 381, 386 (Mo.App.1977); *Dubail* v. *Green Trails Plaza,* 587 S.W.2d 934, 941 (Mo.App.1979); Rule 84.04. In their Statement of Facts, appellants do refer to specific witnesses and exhibits which they claim were not disclosed. Even if this information is the subject of appellants' complaint and even if it should have been disclosed, appellants have still failed to show reversible error in the Commission's subsequent use of these witnesses and exhibits at trial. The Commissioner, like a trial judge, has discretion in deciding whether to impose sanctions for failure to comply with his orders for discovery. *See Schmelig Construction Co., Inc.* v. *Missouri State Highway Comm'n.,* 543 S.W.2d 265, 270 (Mo.App.1976). Appellants have failed to show an abuse of this discretion and resulting prejudice and, thus, have failed to establish reversible error. *See Coffman* v. *Faulkner, supra* at 26; *Kennedy* v. *Tallent,* 492 S.W.2d 33, 39 (Mo.App.1973).

None of appellants' alleged irregularities was an impropriety which violated appellants' rights. Thus, there is no necessity to consider the cumulative effect of these alleged errors. *See Baker* v. *Ford Motor Co.*, 501 S.W.2d 11, 18 (Mo.1973).

[20] Finally, appellants contend the Commissioner erred in sustaining objections to various questions appellants asked on cross-examination. They contend these rulings denied them their statutory right to examine witnesses. See 536.070(2). The Commissioner, like a trial judge, has wide discretion in determining the scope of cross-examination, *e. g.*, *Cash* v. *Bolle*, 423 S.W.2d 743, 746 (Mo.banc 1968), and we examine each of appellants' complaints in the light of this fundamental principle.

[21] First appellants contend they should have been allowed to impeach the testimony of Haury with allegedly inconsistent deposition testimony. The depoisition testimony was not admitted, but it is in the record in the form of an offer of proof. We have examined the testimony and see no prejudice to appellants in its exclusion. We find its inclusion would have no effect on the outcome of the hearing. Furthermore, following the offer of proof, Haury testified on the record in the same manner as he testified in the excluded deposition testimony. Thus, the information which appellants desired to place before the Commissioner was in fact before him.

[22] Appellants next complain it was error for the Commissioner to reject certain testimony as hearsay. In this instance, the witness was a closing clerk at the title company where the closing on the Blow Street property took place. On cross-examination, appellants' counsel asked her why the closing file on the property was taken out of the normal channels two days after the closing. The Commissioner sustained the Commission's objection on the ground the question called for hearsay. As an offer of proof, the clerk testified Eugene Larson, an officer of the title company, told her in late September the file was being taken out of normal channels because there was

going to be an investigation involving the file. Apparently, appellants believe this testimony was admissible to show inconsistencies with Larson's prior testimony. Larson had testified he believed the first time he knew there was to be an investigation was sometime after November 17th. However, his testimony was equivocal and indicated uncertainty as to the dates involved. Larson stated that it was possible the file was taken out of the normal course of business two to three days after the September 20th closing because of the pending investigation. Any real inconsistency is minor. Furthermore, appellants have not demonstrated the materiality of the date Larson learned of the investigation. Even if this ruling of the Commissioner were improper, appellants have not demonstrated any prejudice worked by the exclusion of the clerk's testimony. *See Coffman* v. *Faulkner, supra* at 26.

[23-25] Appellants called the Commission's attorney, Eugene Bushmann, as a witness. Appellants complain about the Commissioner's limitation of their examination of Bushmann. Apparently, in an attempt to show bias on the part of the Commission, appellants' counsel asked Bushmann a series of questions about certain of his conversations with Kathy Freiner. The Commissioner sustained objections to these questions on the ground of relevancy. In the offer of proof, Bushmann testified he did not recall any of these conversations. Testimony is relevant only if it tends to prove or disprove a fact in issue. *Charles F. Curry and Co.* v. *Hedrick,* 378 S.W.2d 522, 536 (Mo.1964). Bushmann's proffered testimony, reflected in the offer of proof, did not tend to prove or disprove any bias. Thus, we find no error in the Commissioner's ruling. Also, appellants contend the Commissioner erred in not compelling Bushmann to testify about a particular conversation he had with McKee, the Commission's investigator. Bushmann stated he believed McKee was calling him as a personal attorney seeking legal advice. From the general tenor of the conversation, Bushmann concluded that McKee believed he was relating information to Bushmann "in

the nature of a client to an attorney." Although not certain, Bushmann believed an attorney-client relationship was created and he asserted the privilege in order for the Commissioner to make the ultimate determination. On this record, the Commissioner declined to order Bushmann to testify. At the trial level, Bushmann may have had the burden of showing McKee's conversation with him was privileged. *E. g., Hutchison* v. *Steinke,* 353 S.W.2d 137, 144 (Mo.App.1962). In this Court, appellants have the burden of establishing to support the Commmissioner's ruling. *Id.* at 144. Appellants have not sustained this burden. At the hearing, appellants objected to the Commissioner's ruling, but they laid no additional foundation, by offer of proof or otherwise, showing the particular conversation between Bushmann and McKee was not privileged. Absent this showing, we are unable to find the Commissioner was shown a proper alternative to his ruling and, therefore, on the present record, we cannot say he ruled improperly. *See, e. g., Hutchinson* v. *Steinke, supra* at 144; *cf. State* v. *Battles,* 607 S.W.2d 723, 727 (Mo.App.1980).

Judgment affirmed.

SMITH, P. J., and SIMON, J., concur.

APPENDIX E

Memorandum

TO: Attorneys of Record

FROM: Ronald N. Bellamy, Clerk
Missouri Court of Appeals
Eastern District

RE: Motions for Rehearing and/or Transfer (Rulings)

DATE: May 15, 1981

The following motions for rehearing and or transfer to the Missouri Supreme Court have all been denied as of this date May 15, 1981:

1.	No. 41748	Union Electric Co. v. The Siteman Organization, Inc. et al.
2.	No. 41911	State of Missouri v. Kevin Johnson
3.	No. 41969	Hilda Markwardt v. Norman J. Markwardt
4.	No. 42035	Lucille Samnee v. Home Service Propane Gas Co.
5.	No. 42039	Alfred W. Mueller, et al v. John J. Ruddy, et al.
6.	No. 42278	Valcue Carmel v. David J. Dieckmann, et al.
7.	No. 42287	State of Missouri v. Marvin T. L. Matthews
8.	No. 42503	Mary L. Word v. City of St. Louis
9.	No. 42559	Robert L. Slack, et al v. Larry N. Englert, et al.
10.	No. 42569 & 42606	Edward L. Bakewell, Inc. v. Richard H. Waltke, et al.
11.	No. 42570	Bob Buttry et al. v. Liberty Mutual Fire Ins., et al.
12.	No. 42710	State of Missouri v. Andre Robinson

13.	No. 42897	State of Missouri v. Jeffrey Vincent Zerban
14.	No. 42916	In the Interest of C.L.M., Regina Dutkiewicz
15.	No. 42917	State ex rel. Automobile Club Inter-Ins. Exchange, et al v. Hon. Carl R. Gaertner, Judge, etc.
16.	No. 43165	Miriam T. Potter, etc., v. Bernard F. Desloge
17.	No. 43259	Paul J. Wengler, v. Druggists Mutual Ins. Co.
18.	No. 43448	State, ex rel. Beverly A. Husgen v. Hon. Harry J. Stussie, Judge, etc.

RNB:mo

cc: Judges

APPENDIX F

Clerk Of The Supreme Court
State Of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

July 14, 1981

Mr. Daniel G. Tobben
8850 Ladue Road
St. Louis, Missouri 63124

In re: Alfred W. Mueller, et al. v. John J. Ruddy, et al.
Supreme Court No. 63114

Dear Mr. Tobben:

This is to advise that the Court this day entered an order in the above-entitled cause, a certified copy of which is herewith attached.

Very truly yours,

/s/ Thomas F. Simon
Clerk

Attachment
cc: Mr. Eugene Busman

Supreme Court No. 63114
In The Supreme Court Of Missouri
Eastern District No. 42039

May Session 1981

Alfred W. Mueller, et al.,
Plaintiffs-Appellants,

v.

John L. Ruddy, et al.,
Defendants-Respondents.

Transfer

Now at this day, on consideration of Plaintiffs-Appellants' Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

State Of Missouri—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1981, and on the 14th day of July 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of July 1981.

/s/ Thomas F. Simon, Clerk.

/s/ Anne Bechorst, D. C.

APPENDIX G

IN THE MISSOURI COURT OF APPEAL
ST. LOUIS DISTRICT

Court of Appeals No.

State ex rel

Alfred W. Mueller, Al Mueller Realty Company, and
David E. Windmueller,
Petitioners,

vs.

Michael C. Horn, Administrative Hearing Commissioner,
Respondent.

Petition For Writ Of Prohibition

Comes now Petitioners and state the following:

1. Plaintiff Al Mueller is an individual, who is the Managing Officer of Al Mueller Realty Company, a Missouri Corporation and Plaintiff David Windmueller is an individual employed by Al Mueller Realty Company.

2. Defendant is an Administrative Hearing Commissioner, who is currently hearing an administrative action, Case No. 78,005 and 78,005-A, styled the Missouri Real Estate Commission v. Alfred W. Mueller, Al Mueller Realty Company, and David E. Windmueller, which proceeding is currently being heard in the Civil Courts Building in the City of St. Louis on the Ninth Floor in Magistrate 5 Courtroom.

3. The administrative proceeding brought by the Missouri Real Estate Commission is for the purpose of hearing charges against the aforesaid plaintiff petitioners, so as to recommend possible sanctions and discipline against the aforesaid plaintiffs petitioners.

4. The attorneys for the plaintiffs petitioners have presented to the Administrative Hearing Commissioner the attached Motion to Dismiss to strike Petitioner's Pleadings and Allegations or in the Alternative to Indefinitely Stay Proceedings. Attached thereto is a transcript of a recorded statement from Mr. Jim McKee, the investigator for the Missouri Real Estate Commission. In said statement, McKee indicates that Al Mueller is being railroaded and that he has evidence which could turn things one way or another.

That subsequent to the time of the recorded statement, the attorney for plaintiffs petitioners has taken the deposition of Mr. McKee. McKee has refused to answer questions concerning exonerating evidence in his possession on the basis that such information may tend to incriminate him.

5. McKee's invocation of the Fifth Amendment has prejudiced plaintiff petitioners in preparing for their case and constitutes a violation of the Missouri case law, the Missouri Rules of Civil Procedure, especially Rule 61 and furthermore constitutes a violation of fundamental fairness of the due process provisions of the United States and Missouri Constitutions.

6. That the aforesaid Motion and Documents in Support thereof have been presented to the defendant Administrative Hearing Officer and the original tape presented to him with the stipulation that it was a conversation between Al Mueller and James McKee.

7. That despite said Motion and said evidence, defendant hearing officer has overruled the Motion of plaintiff petitioner and is now proceeding with the hearing of the case, and will continue to proceed on the merits of said case, in violation of the rights of plaintiffs petitioners unless he is restrained from doing so.

8. That after the Administrative Hearing Officer overruled petitioner's motion, petitioner did file a Writ of Prohibition on

May 22, 1978 in the Circuit Court of the City of St. Louis, bearing a Cause Number 787-3717. On May 23, 1978 after argument with both sides present, the Honorable Richard Mehan entered an order denying petitioner's petition for a preliminary Writ of Prohibition.

9. Plaintiff's petitioners will suffer irreparable harm unless defendant is enjoined and restricted from proceeding with the hearing pending the hearing on the merits of the Petition for Injunction filed herewith.

10. Plaintiff petitioners are likely to prevail upon the merits in this injunctive action and in the administrative action before the Court, but plaintiff petitioners are threaten irreparable damage, due to their ability to properly present their case due to the failure of defendant administrative hearing officer to stay proceedings.

10. The petitioners are without inadequate remedy at law.

WHEREFORE petitioners pray the Court immediately issue its preliminary writ of prohibition commanding the Honorable Michael C. Horn, Administrative Hearing Commissioner, from any further proceedings in said action, and ordering the aforesaid Michael C. Horn to show cause to this Court on a date specified why a final judgment in prohibition should not be rendered staying all further proceedings in the action until such time as James I. McKee shall disclose to petitioners the exonerating evidence showing that Al Mueller is being railroaded.

/s/ Alfred W. Mueller, Petitioner
4021 Union Rd.
St. Louis, Mo. 63129

STATE OF MISSOURI }
SS
CITY OF ST. LOUIS }

On this _____ day of _____, 1978 personally appeared before me Alfred W. Mueller, who stated that the above facts were true and accurate to the best of his knowledge and belief.

Notary Public

My Commission Expires:_____

/s/ David O. Danis

/s/ Daniel G. Tobben
Attorneys for Petitioners
WHALEN, O'CONNOR,
DANIS & TOBBEN
610 Locust, Suite 1921
St. Louis, Mo. 63101

APPENDIX H

Missouri Court Of Appeals
St. Louis District
Civil Courts Building
St. Louis, Mo. 63101

May 23, 1978

Mr. David O. Danis
Mr. Daniel G. Tobben
610 Locust St., Suite 1921
St. Louis, MO 63101

Mr. Eugene Bushman
Missouri Real Estate Commn.
Jefferson City, MO 65101

40484 - State ex rel., Alfred W. Mueller, Al Mueller Realty Co., and David E. Windmueller, Rels. v. Michael C. Horn, Administrative Hearing Commissioner, Resp.

Gentlemen:

The Court has today made the following order in the above entitled cause:

May 23, 1978 — Petition for Writ of Prohibition denited

May 23, 1978 — Motion to waive five day notice denied.

Yours truly,

/s/ Robert D. St. Vrain
Clerk

RSV/at

Opposition

81-592

No.

Office-Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED W. MUELLER and AL MUELLER REALTY COMPANY,
Petitioners,

vs.

JOHN J. RUDDY, RALPH H. SLAVENS and L. K. WOOD,
Comprising the Missouri Real Estate Commission,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE G. BUSHMANN
JOHN W. INGLISH
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213 East Capitol Avenue
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314-634-3335
Counsel for Respondents

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Brady* v. *Maryland*, 373 U.S. 83, 83 S.ct. 1194,10 L.Ed.2d 215 (1962), a criminal case, apply to this civil administrative proceedings? In *Brady* a prosecutor suppressed identifiable evidence. In this case the trial judge and the appellate court reviewed the evidence and found that the investigator assigned to respondent had no information that might be beneficial to respondent. All the information that the investigator had was given to respondent, who testified that it was worthless. Should this Court reexamine the evidence in this case to determine:

   a. The existence of any exculpatory information?

   b. Its availability to respondent?

   c. That respondent suppressed it?

2. An investigator assigned to respondent solicited money from petitioner for alleged exculpatory information. Whatever information he had he later showed to respondent. Respondent testified that he reviewed the information and that it was worthless. At his deposition, the investigator said he had no exculpatory evidence or information beneficial to petitioner and that all the information he had was given to petitioner. During the deposition and again at trial, when asked about his conversation with petitioner wherein he solicited money, the investigator invoked his Fifth Amendment privilege against self-incrimination. Should the revocation of petitioner's real estate broker's license, based on substantial proof of fraud, be set aside because the investigator exercised his constitutional privilege?

PARTIES

(All reference to the parties herein shall be in the singular rather than the plural.)

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	i
Statement of the Case	1
Lack of Jurisdiction	2
Summary of Argument	3
Argument	4
Conclusion	5

Table of Authorities

Brady v. Maryland, 373 U.S. 83, 83 S.ct. 1194, 10 L.Ed.2d 215 (1962)	4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALFRED W. MUELLER and AL MUELLER REALTY COMPANY,
Petitioners,

vs.

JOHN J. RUDDY, RALPH H. SLAVENS and L. K. WOOD,
Comprising the Missouri Real Estate Commission,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The detailed Findings of Fact and Conclusions of Law of the trial judge were affirmed by the Circuit Court and the Appellate Court. Those findings and conclusions are printed in petitioner's Petition and show there was substantial evidence to prove petitioner guilty of fraud and support the revocation of his real estate broker's license.

However, a few days prior to trial an investigator assigned to respondent solicited money from petitioner for alleged exculpatory information. The information was in the form of tape

recordings made when originally interviewing witnesses in the case and which was the basis of his report to respondent. This report was given to petitioner. At the trial, petitioner admitted that he listened to the tapes and concluded they were worthless.

Petitioner took the investigator's deposition following the solicitation. The deposition was lengthy. There were thirty-seven (37) pages of questions and answers concerning what the investigator knew of the case. The investigator stated that he knew of no exculpatory information, that he had no evidence nor knew of any that would be beneficial to petitioner and that all the information he had was given to petitioner. At the trial, petitioner consented to the admission of the deposition into evidence. In his Findings of Fact, the trial judge found that the investigator did "not have any information which [petitioner has] not seen or heard and which might be beneficial to their case." (p. A-7, petitioner's Petition)

At the end of the deposition the investigator was asked about his conversation with petitioner wherein he solicited money for the alleged exculpatory information, and he refused to answer on the grounds of possible self-incrimination. At the trial, petitioner called the investigator as a witness, was again asked about his conversation with petitioner and he again asserted his constitutional right against self-incrimination.

LACK OF JURISDICTION

Petitioner alleges jurisdiction "pursuant to the provisions of Sup. Ct. Rule 17 (.1)(C)". It is not stated whether petitioner believes the lower court "decided an important question of federal law which has not been, but should be, settled by this Court", or whether the lower court "decided a federal question in a way in conflict with applicable decisions of this Court." The reason these grounds were not specified is because they do not exist.

The Missouri Court did not decide the case below "in conflict with applicable decisions of this Court." The lower court merely said that *Brady* v. *Maryland,* 373 U.S. 83, 83 S.ct. 1194,10 L.Ed.2d 215 (1962), the case which petitioner relies upon, was distinguishable from this case and, therefore, not applicable. However, even if it were, the lower court said it would have had no effect on the outcome of this case.

The Missouri court did not decide "an important question of federal law which has not been, but should be, settled by this court." The lower court, as did the trial judge, merely reviewed all the evidence and found that there was no exculpatory evidence available to respondent nor any relevant information that was withheld from petitioner. When the investigator asserted his constitutional privilege against self-incrimination, the lower court refused to rule that this nullified petitioner's conviction and subsequent revocation of his license.

SUMMARY OF ARGUMENT

1. This Court should not attempt to review all the evidence in this case. The trial court and Missouri appellate court examined the evidence and found that there was substantial evidence to prove petitioner guilty of fraud. Also, there was no exculpatory information in the possession of the investigator assigned to respondent. No evidence was suppressed. All the information that respondent had was given to petitioner. Since no exonerating information exists, then this court need not determine whether *Brady* v. *Maryland,* 373 U.S. 83, 83 S.ct. 1194,10 L.Ed.2d 215 (1962), applies to civil administrative proceedings nor whether it applies to this case.

2. Petitioner received a full and fair trial before an independent and impartial hearing officer. His conviction of fraud and revocation of his real estate broker's license should not be set aside because an investigator assigned to respondent asserted his constitutional privilege against self-incrimination.

ARGUMENT

Petitioner has misstated an essential fact. He claims in his brief that the investigator "took the fifth amendment in depositions and at trial regarding exonerating evidence". (p. 6) This is not true. The investigator testified extensively during his deposition and clearly stated that there was no exonerating evidence. He said he knew of no evidence that was beneficial to petitioner and that all the evidence he had was given to petitioner. The investigator only "took the fifth amendment" when asked whether he had solicited money from petitioner for the alleged exculpatory information.

The basis of petitioner's Petition is the implication that exonerating evidence exists, presumably in the possession of the investigator. However, the trial judge, after hearing all the evidence, found as a matter of fact that such information does not exist. (p. A-7 of petitioner's Petition) The appellate court opinion repeats the findings that the investigator denied having any information beneficial to petitioner and what information the investigator alleged exculpatory was shown to petitioner, who considered it worthless. (p. A-29 of petitioner's Petition) Petitioner is asking this Court to review the voluminous record in this case, substitute its judgment on the evidence and set aside the Findings of Fact of the trial judge and the evidentiary conclusions of the appellate court.

If, as a matter of fact, there is no exculpatory information in the investigator's possession, then *Brady* v. *Maryland*, 373 U.S. 83, 83 S.ct. 1194,10 L.Ed.2d 215 (1962) does not apply in this case. This is essentially what the Missouri appellate court decided. The lower court assumed the *Brady*, a criminal case, applied to civil administrative proceedings, but that issue must still be decided by this Court. If this Court were to apply the criminal rule to civil cases, this particular case would be inappropriate because it would not effect the outcome of this case. Petitioner has not established:

1. The existence of any exculpatory information.

2. Its availability to respondent.

3. That respondent suppressed it.

There was a lengthy trial in this case and there was substantial evidence, as found by an impartial and independent hearing officer, to prove that petitioner, as a real estate broker, was guilty of fraud against his principal. Petitioner had a full and fair trial.

When taking the investigator's deposition and again at trial, petitioner asked the investigator if he had solicited money from petitioner for alleged beneficial information. On both occasions the investigator asserted his Fifth Amendment privilege against self-incrimination. The exercise of the investigator's constitutional rights should not nullify competent and substantial evidence that has proven petitioner's dishonest dealings. As the lower court properly stated, the investigator's "assertion of his privilege against self-incrimination was not and cannot be equated to the state's suppression of evidence". (p. A-30 petitioner's Petition)

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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